146 US 338

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 375. 51

THE UNITED STATES, APPELLANT,

vs.

CHARLES ALLEN DUNNINGTON ET AL.

No. 376. 52

CHARLES ALLEN DUNNINGTON ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1889.

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1 In the United States Court of Claims.

CHARLES A. DUNNINGTON AND OTHERS
vs.
THE UNITED STATES. } No. 15783.

Petition.—Filed October 26, 1887.—*A. H.*

To the Honorable Judges of the Court of Claims of the United States:

The petition of Charles Allen Dunnington; Catherine Lydia Dunnington, now the wife of J. H. Wilson; William Alexander Dunnington; Annie Letitia Dunnington; Harriet Howison Dunnington; together with Joseph Henry Wheat and Ann Letitia Wheat, the minor children of Elizabeth Colquhoun Dunnington, the first wife of J. F. Wheat, the said minors herein appearing by their next friend, Charles Allen Dunnington—all citizens of the United States, residing in the District of Columbia, except Catherine Lydia Dunnington and her husband, who reside at Somerville, New Jersey—respectfully represents:

First.—That petitioners are the sole legal surviving heirs, the children and grandchildren of Charles W. C. Dunnington, late of the District of Columbia, born December 5, 1818, died August 14, 1887, and was married in 1842 to Catherine M. Allen, now a resident in the District of Columbia.

Second.—That their father, the said Charles W. C. Dunnington, was, on the second day of April, 1852, and subsequently up to June 29, 1863, seized or well entitled in fee-simple of and to the lot numbered three, in square numbered six hundred and eighty-eight, as the same is known, marked, and designated on the ground plats and plans of the city and county of Washington and District of Columbia, recorded in the land records of said District, together with the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any wise pertaining; the west part of said lot, by deed dated June 30, 1849, and the east part of the same, by deed dated April 1, 1852,
2 were acquired by the said Chas. W. C. Dunnington by purchase from James Adams, as will appear by reference to the duly-certified copies of the said deeds, now produced and made parts of this petition, as Exhibits A and B; the said lot 3, in square 688, containing 5,572 square feet.

Third.—That on May 12, 1863, proceedings in rem, numbered 14 on the docket, were commenced in the supreme court of the District of Columbia, under the act of July 17, 1862, and joint resolution of same date, explanatory thereof (12 Statutes of United States, pages 589 and 627), to confiscate the said lot 3, in square 688, the property of the said Charles W. C. Dunnington, as a rebel and offender against the United States. Monition was ordered and published, due proceedings had, and on July 29, 1863, a final decree of condemnation was entered, and the marshal of the said court ordered to make sale of said lot 3, in square 688, after ten days' notice of the time, place, and terms of sale, and maek a deed of conveyance of said right, title, and interest and estate in and to said real estate to the purchaser thereof, to be approved by the court, and, after the said sale, give said purchaser immediate possession of said real estate. The venditioni exponas for this purpose was issued August

14, 1863, and the property was sold the 9th day of September, 1863, for $825, to Alexander R. Shepherd, who went into immediate possession thereof. All of which appears by the record of said suit and the return of the marshal.

Fourth.—That the legal effect of these confiscation proceedings was to absolutely deprive Charles W. C. Dunnington of all ownership, possession, and control of every nature in lot 3, in square 688; and the further effect thereof was to vest in the United States, or the purchaser at the sale, all the interest of Charles W. C. Dunnington, the ancestor of petitioners, in and to the said lot during the lifetime of said Dunnington, but at his death the right of his heirs exclusively vested eo instanti to enable them to take the lot 3, in square 688, as his inheritance, but entirely free from all his obligations, and that under the confiscation proceedings neither the United States nor any other person could sell anything more of the property condemned than a life estate.

Fifth.—That Charles W. C. Dunnington died August 14, 1887, and consequently your petitioners became at once, on that day, the owners in full property of lot 3, in square 688, a title in fee-simple, without the slightest incumbrance of any kind, and the property was then and there in the full possession and control of the United States as a locus publicus, by virtue of void expropriation proceedings, hereinafter set forth.

Sixth.—Petitioners further show that during the life of Charles
3 W. C. Dunnington, and whilst lot 3, in square 688, was in the possession and control of the persons holding the life estate in the said lot under and by virtue of the proceedings of the United States in confiscation above set forth, and whilst the interest of C. W. C. Dunnington in said lot was either in the United States, or the purchaser and his assigns in the confiscation proceedings, and whilst petitioners held the estate in expectancy, the United States, in error and ignoring all they had done in confiscating the whole and selling C. W. C. Dunnington's life estate in said property, instituted proceedings, under an act of Congress of May 8, 1872 (17 Stats., 83), to enlarge the public grounds around the Capitol, in the supreme court of the District of Columbia, and expropriate private property needful for this purpose. Under these proceedings lot 3, in square 688, was embraced, and appraised at a value of one dollar and a half a square foot—

Say 5,572 square feet at $1.50 per square foot	$8,358
And improvements thereon at	1,500
	9,858

on July 12, 1872, and approved by the court October 16, 1872, and the whole sum paid in error to the heirs of Martin King, a short time afterwards, as though they were the owners in fee, whilst the only interest they had was the usufruct or life estate of C. W. C. Dunnington in said lot and improvements.

Seventh.—Petitioners submit that these expropriation proceedings for public utility are absolutely void as to them. They have had no day in court, nor had they any interest in lot 3, square 688, to prosecute or defend until the death of Charles W. C. Dunnington. Their rights were vested by the confiscation proceedings but could be enforced only after his death. Until then the lot was out of commerce, and could not be bought or sold by anyone, except so far as the life estate was concerned.

All the title the United States could and did acquire by the expropriation proceedings was an estate during the life of C. W. C. Dunnington, and this having expired, the United States are now the naked custodians of the fee-simple title—of the full and perfect ownership of these petitioners in and to the said lot 3, in square 688, with the improvements, &c., and bound in law and equity, as well as by national honor and plighted faith, the Federal Constitution, and the laws made under it, to put petitioners into immediate possession thereof. But as this lot has been made in error a part and parcel of the Capitol Grounds, by proceedings absolutely void as to petitioners, and for this reason can not be restored in kind to petitioners without producing an eyesore, like the plebeian's mill to the great Frederick, petitioners have agreed to ask a moneyed compensation for their lot and improvements, &c., in case the court shall be of opinion
4 that this relief can be properly granted. That the ground in question is well worth two dollars per square foot at the present time, and was so worth on the day of C. W. C. Dunnington's death, say—

5,572 feet square feet, at $2, is	$11,144
And the improvements were worth at the time of the confiscation, and would now be worth at least so much, say	1,500
	$12,644

say twelve thousand six hundred and forty-four dollars, and for the recovery of this sum they now bring this suit in this court under the recent act of Congress of March 3, 1887. (24 S. L., 505.)

Eighth.—And petitioners further show that the claim they present here does not grow out of the late civil war, and never was and is not now known as a "war claim;" that it never has been heretofore rejected, or reported on adversely by any court, department, or commission, or even presented to them, and that they have never moved in the same in any manner, form, or shape until after the death of Charles W. C. Dunnington, and have made no assignment or transfer of said claim, or of any part thereof or interest therein.

Wherefore petitioners respectfully pray, the premises considered, that they may have judgment against the United States for twelve thousand six hundred and forty-four dollars, with interest from judicial demand, and costs of court, and all further general and equitable relief, or for the delivery to them in kind of lot 3, in square 688, and an accounting for the improvements.

ROBT. H. BRADFORD,
8th and F streets,
CHARLES W. HORNOR,
No. 617 7th street NW.,
Attorneys for Petitioners.

Charles A. Dunnington, one of the above petitioners, being duly sworn deposes and says that no assignment or transfer of the claim set out in the foregoing petition or any part thereof or interest therein, has been made; that the claimants are entitled from the United States either to a surrender of lot 3, square 688, in kind, or to the amount claimed in said petition, and that all the allegations in said petition contained are true.

CHARLES A. DUNNINGTON.

[SEAL.]

JAS. A. TAIT,
Notary Public.

5 II.—*General traverse.*—*Filed April* 14, 1888.

And now comes the Attorney-General, on behalf of the United States and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petiton be dismissed.

And as to so much of the said petition as avers that the said claimant have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

6 III.—*Findings of fact and conclusion of law.*—*Filed May* 6, 1889.

FINDINGS OF FACT.

This case, having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Charles W. C. Dunnington, the ancestor of the claimants, was, on April 2, 1852, and subsequently up to June 29, 1863, seized or well entitled in fee simple of and to the lot No. 3, in square No. 688, on the plats of the squares and lots of the city of Washington, with the improvements, buildings, rights, privileges, appurtenances, and hereditaments, containing 5,572 square feet.

Said Dunnington, the ancestor, died August 14, 1887, leaving as his sole heirs the claimants in this case, as set out in their petition.

II.

May 12, 1863, proceedings in rem, under the Confiscation Act of July 17, 1862, and joint resolution of the same date (12 Stat., 589 and 627), were begun by the defendants in the supreme court of the District of Columbia to confiscate said lot as the property of Dunnington, who was in rebellion against the United States. Under these proceedings the lot was duly condemned as enemy property and exposed to public sale, at which A. R. Shepherd became the purchaser and entered into possession.

III.

Under the act of May 8, 1872 (17 Stat., 83), proceedings were commenced in the supreme court of the District of Columbia, at the instance of the defendant, for the acquisition of land to enlarge the grounds around the Capitol, in which contemplated enlargement said lot No. 3 was included.

7 June 11, 1872, the Secretary of the Interior informed the court that he was unable to obtain the titles to said lands by mutual

agreement with the owners. Thereupon the court appointed commissioners "to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements necessary to be taken for public use, and make return to said court."

October 16, 1872, said commissioners filed their report, in which the cash value of said lot No. 3 is appraised at $1.50 a square foot, and the improvements thereon at $1,500. They also report that said lot contained 5,572 square feet, thus making the whole value of lot and improvements $9,858.

On the same day said appraisement was approved and adopted by the court, and the same was reported to the Secretary of the Interior.

March 15, 1873, the court made the following order:

"Whereas it appears to the court that the owner or owners of each of said lots and parts of lots have failed and neglected to demand of the Secretary of the Interior the said appraised cash value of said lots and parts of lots, respectively, for fifteen days after the appraisement thereof by this court, it is therefore ordered that leave be, and is hereby, granted to said relator to deposit the said appraised values of said lots and parts of lots in this court, to the credit of the owners thereof, respectively, subject to be drawn therefrom only upon an order of this court for payment to the parties entitled; and it is further ordered that upon the depositing of the money by the relator as hereinbefore provided, and notice thereof filed with the clerk of this court, possession of the property for which such deposit is made may be taken by the United States."

IV.

March 31, 1873, in pursuance of the above order, a certificate of deposit for the amount of said appraisement was filed with the court by the Secretary of the Interior.

Thereupon the defendants took possession of said lot, and the same is now embraced in the ornamental grounds about the Capitol.

V.

April 3, 1873, upon the petition of the heirs of Martin King, deceased, the appraised value of said lot and improvements, amounting to $9,858, was, by order of the court, paid to William F. Mattingly, attorney of record for said heirs.

Said King was the vendee, through several intermediate conveyances, of said A. R. Shepherd.

VI.

The cash value of said lot No. 3 on August 14, 1887, was at the rate of $2 a square foot, $11,144; improvements, $1,500, making together $12,644.

CONCLUSION OF LAW.

Upon the foregoing findings of facts the court decides, as conclusion of law, that the claimants are entitled to recover $9,858.

8 VII.—*Opinion.*

SCHOFIELD, J., delivered the opinion of the court:

Charles W. C. Dunnington, the ancestor of the claimants, was, on June 29, 1863, and for many years before, the owner, in fee-simple, of lot No. 3, of square 688, in Washington, D. C.

May 12, 1863, proceedings in rem under the confiscation act of July 17, 1862, and joint resolution of the same date (12 Stat., 589 and 627) were begun by the defendants in the supreme court of the District of Columbia to confiscate said lot as the property of Dunnington, who was in rebellion against the United States. Under these proceedings the lot was duly condemned as enemy property and exposed to public sale, at which A. R. Shepherd became the purchaser and entered into possession.

Under the act of May 8, 1872 (17 Stat., 83), enacted for the purpose of enlarging the Capitol Grounds, this lot was condemned, at the instance of the defendants, by proceedings in said court, and taken for public use. By the further proceedings in court the lot was appraised at $9,858, which sum was paid into court by the defendants, as provided in the act. Thereupon the defendants took possession of the lot, and it is now embraced in the ornamental grounds about the Capitol.

April 3, 1873, by order of the court, the purchase money so deposited was paid to the heirs of Martin Ring, deceased, who, by several intermediate conveyances, had succeeded to the title of Shepherd.

August 14, 1887, the ancestor, Dunnington, died, leaving as heirs the present claimants.

It is conceded by counsel for the defendants that, under the construction put upon the confiscation acts by the Supreme Court, the estate acquired by Shepherd terminated at the death of Dunnington, and that the fee then devolved upon the claimants, or at least would have so devolved if the land had not already been taken by the defendants through the proceedings in court and appropriated to public use. It is also conceded that the claimants have not, in fact, received any compensation therefor.

This suit is brought to recover the "just compensation" which the Constitution requires should be made to the owners of private property when taken for public use.

It will scarcely be denied that justice requires that the land should be surrendered or its appraised value paid to the claimants. In this suit they seek only "just compensation," the recovery and payment of which, as the court understands it, confirms in the defendants the possession and title now claimed by them. Two objections are interposed to such recovery:

First. It is said the defendants have already discharged their constitutional obligation by depositing the compensation claimed with the court of the District, and that the order of the court directing the same to be paid to parties other than the claimants is an adjudication of ownership conclusive upon all parties claiming title.

The place and manner of deposit were designated in a special law, made by the defendants for their own convenience. The Constitution required the defendants to make "just compensation" to owners. It makes no difference to such owners through what channels or by what agency the

compensation may be sent, provided it finally reaches the right
9 party. Placing the compensation where the rightful owners may never be able to claim it, and where, as in this case, they could by no possibility hear of it until it had passed beyond their reach, is not a fulfillment of the constitutional obligation.

So far as the order of the court is concerned it ought to be a satisfactory answer to say that the claimants were not parties to it. If Dunnington had died prior to these proceedings they might have been parties to, and concluded by, them. As it was, they were neither summoned nor heard, and it was impossible that they should be, because at that time they had no legal existence. The court, even, was not advised, so far as the record shows, that any such claim existed or might ever arise. But, in legal contemplation, the defendants knew of it, for they were the originators of and parties to the confiscation proceedings, whereby the title of Dunnington was divested and hung up somewhere, possibly in the defendants, as trustees, until by his death it should devolve upon whoever should then be found to be his heirs. Wallach v. Van Riswick (92 U. S. R., 202), Shields v. Schiff (124 U. S. R., 351).

We are unable to see how, under such circumstances, the claimants' right to compensation could be defeated, either by the deposit in the court or by any disposition of it which the court may have made. When they came into their title they had a right, by affirming so much of the condemnation proceedings as vests title in the defendants, to claim the appraised value.

The second objection is to the jurisdiction of the court. That jurisdiction, by section 1069 of the Revised Statutes, extends to "all claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract express or implied. In the facts of this case all these elements of jurisdiction are to some extent combined.

The defendants took private property for public use, and the Constitution enjoins them to make "just compensation." The very taking imposes upon the defendants a duty from which alone a promise to do the only thing that justifies the taking may be implied. But there was also a law of Congress which undertook to discharge that duty. It directed that compensation should be made, and prescribed a mode of ascertaining the amount of it. It went further, and made an appropriation to meet it, and directed the Secretary of the Interior to pay it over. The amount was ascertained, the money drawn from the Treasury, and only failed of finally reaching the claimants by a misdirection in the transmission of it. For this misdirection the claimants were not, but the defendants were, responsible. These facts combined not only constitute an implied promise, but may be regarded as a continuing offer of settlement which the claimants accepted at the first possible opportunity. They attest at once both the liability of the defendants and the jurisdiction of the court.

This conclusion is sustained by more than one decision of the Supreme Court. The opinion of that court in the case of the United States v. The Great Falls Manufacturing Company (112 U. S. R., 645), appears to be fairly stated in the head-notes, which we quote as follows:

"Where property to which the United States asserts no title is taken by their officers or agents, pursuant to an act of Congress, as private property for the public use, the Government is under an implied obligation to make just compensation to the owner.

"Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the owner's claim for compensation is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the Court of Claims, although there may have been no formal proceedings for the condemnation of the property to public use.

"The owner may waive any objection he might be entitled to make based upon the want of such formal proceedings, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, may demand just compensation for the property."

This case is cited with approval in Hollister v. Benedict Manufacturing Company (113 U. S. R., 67).

In the Great Falls Manufacturing Company v. The Attorney-General (124 U. S. R., 581) the question is again discussed and the same principles enunciated.

Judgment will be entered for the claimants in the sum of $9,858.

V.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 6th day of May, A. D. 1889, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants, and do order, adjudge, and decree that the said Charles Allen Dunnington, Catherine Lydia Dunnington, now wife of J. H. Wilson, William Alexander Dunnington, Annie Letitia Dunnington, Harriet Howison Dunnington, together with Joseph Henry Wheat, and Ann Letitia Wheat, minor children of Elizabeth Colquhoun Dunnington, first wife of J. F. Wheat, by their next friend Charles Allen Dunnington, do have and recover of and from the United States the sum of nine thousand eight hundred and fifty-eight dollars ($9,858.00).

VI.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 6th day of May, 1889, in favor of claimants, the defendants, by their Attorney-General, on the 13th day of May, 1889, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Asst. Attorney-General.

Filed May 13, 1889, and allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

VII.—*Application of claimant for and allowance of appeal.—Filed June 5, 1889.*

From the judgment rendered in the above-entitled cause on the 6th day of May, in the year 1889, in favor of the claimants, for the sum of nine thousand eight hundred and fifty-eight dollars ($9,858) and no more, the claimants Charles Allen Dunnington, Catherine Lydia Dunnington, now

the wife of J. H. Wilson, William Alexander Dunnington, Annie Letitia Dunnington, Harriet Howison Dunnington, together with Joseph Henry Wheat and Ann Letitia Wheat, the minor children of Elizabeth Colquhon Dunnington, the first wife of J. H. Wheat, appearing herein by their next friend, Charles A. Dunnington, by their attorneys Charles W. Hornor and George A. King, on the 5th day of June, 1889, make application for, and give notice of, an appeal to the Supreme Court of the United States.

CHARLES W. HORNOR and
GEORGE A. KING,
Attorneys for Claimants.

Allowed in vacation June 5, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

14 In the Court of Claims.

VIII.

CHARLES A. DUNNINGTON AND OTHERS
vs.
THE UNITED STATES. } No. 15783.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of application of the defendants and of the claimants, severally, for the allowance of appeal to the Supreme Court of the United States, and of the allowance of said appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 19th day of June, A. D. 1889.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 375. The United States, appellant vs. Charles Allen Dunnington, Catherine Lydia Dunnington, now the wife of J. H. Wilson; William Alexander Dunnington, Annie Letitia Dunnington, Harriet Howison Dunnington, together with Joseph Henry Wheat, and Ann Letitia Wheat, the minor children of Elizabeth Colquhon Dunnington, the first wife of J. H. Wheat. No. 376. Charles Allen Dunnington, Catherine Lydia Dunnington, now the wife of J. H. Wilson, et al., appellants, vs. The United States. Court of Claims. Filed June 25, 1889.

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
CHARLES ALLEN DUNNINGTON et al. } No. 51.

CHARLES ALLEN DUNNINGTON et al., appellants,
vs.
THE UNITED STATES. } No. 52.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
CHARLES ALLEN DUNNINGTON et al. } No. 51.

CHARLES ALLEN DUNNINGTON et al., appellants,
vs.
THE UNITED STATES. } No. 52.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

These are appeals from the Court of Claims, in which the appellants were awarded the sum of $9,858, being the value of lot 3, in square No. 688, taken by the United States under the act of May 8, 1872 (17 Stat., 83), being proceedings to enlarge the Capitol grounds. The amount for which judgment was rendered against the United States in the court below is the value fixed by the

Commissioners by their report filed in the Supreme Court of the District of Columbia on October 16, 1872. (Rec., 5.) The court found the cash value of the property in question on August 14, 1887, the date of the death of Charles W. C. Dunnington, and through whom appellants claim, to have been, with improvements, $12,644. (Rec., 5, Finding VI.) Because not allowed this sum the plaintiffs below have prosecuted a cross-appeal.

It is conceded that Charles W. C. Dunnington was the owner in fee of the premises named from April 2, 1852, and up to June 29, 1863. (Rec., 4, Finding I.)

May 12, 1863, proceedings *in rem* under the confiscation act of July 17, 1862, and the joint resolution of the same date (12 Stat., 589 and 657), were begun by the United States in the Supreme Court of the District of Columbia, to confiscate said lot as the property of Dunnington, who was in rebellion against the United States. Under these proceedings the lot was duly condemned as enemy property and exposed to public sale, at which A. R. Shepard became the purchaser and entered into possession. (Rec., 4, Finding II.)

By various mesne conveyances the title acquired at this sale passed to one Martin King. Then came the condemnation proceedings under the act passed to provide for the enlargement of the Capitol grounds (17 Stat., 83).

The Secretary of the Interior, on June 11, 1872, informed the court that he was unable to obtain the titles to said lands by mutual agreement with the owners. Thereupon commissioners were appointed by the court authorized "to make a just and equitable appraisement of the cash value of the several interests of each and every

owner of the real estate and improvements necessary to be taken for public use and make return to said court."

The final decree of condemnation was entered on July 29, 1863 (Rec., 1.)

The commissioners fixed the cash value at $9858, as above stated. March 15, 1873, the following order was made:

> Whereas it appears to the court that the owner or owners of each of said lots and parts of lots have failed and neglected to demand of the Secretary of the Interior the said appraised cash value of said lots and parts of lots, respectively, for fifteen days after the appraisement thereof by this court, it is therefore ordered that leave be, and is hereby, granted to said relator to deposit the said appraised values of said lots and parts of lots in this court, to the credit of the owners thereof, respectively, subject to be drawn therefrom only upon an order of this court for payment to the parties entitled; and it is further ordered that upon the depositing of the money by the relator, as hereinbefore provided, and notice thereof filed with the clerk of this court, possession of the property for which such deposit is made may be taken by the United States. (Rec., 5.)

March 31, 1873, in pursuance of this order, a certificate of deposit for the amount of said appraisement was filed with the court by the Secretary of the Interior, and the United States took possession of the lot, which it still has, the same being a part of the Capitol grounds. (Rec., 5, Finding IV.)

April 3, 1873, upon the petition of the heirs of Martin King, the amount so deposited was paid to them by the court. (Rec., 5, Finding V.)

Charles W. C. Dunnington died August 14, 1887, leaving the claimants as his sole heirs. (Rec., 4, Finding I.)

ASSIGNMENT OF ERRORS.

The court erred in its conclusion of law that from the foregoing facts the petitioners were entitled to recover $9858, whereas in fact they should have been denied any relief herein.

ARGUMENT.*

The theory upon which the petitioners sought to recover, and which the court accepted as the true one, is thus stated in their petition:

> Petitioners submit that these expropriation proceedings for public utility are absolutely void as to them. They have had no day in court, nor had they any interest in lot 3, square 688, to prosecute or defend until the death of Charles W. C. Dunnington. Their rights were vested by the confiscation proceedings, but could be enforced only after his death. Until then the lot was out of commerce and could not be bought or sold by anyone, except so far as the life estate was concerned. All the title the United States could or did acquire by the expropriation proceedings was an estate during the life of C. W. C. Dunnington, and this having expired, the United States are now the naked custodians of the fee simple title. * * * (Rec., 2.)

This is the theory of *Wallach* v. *Van Riswick* (92 U. S., 202), in effect overruled by *Jenkins* v. *Collard* (145 U. S., 546), and the cases there referred to.

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* So much of the act as pertains to the condemnation of the lot in question is printed in the appendix to this brief.

It is respectfully submitted that under the law as now settled these petitioners had no "*estate* in expectancy." The life estate of C. W. C. Dunnington was sold. The remainder did not vest in the United States—there was no *royal trustee*—and upon the death of Mr. Dunnington, without conveyance or disposition by him, his then heirs-at-law took by descent from him, and not by donation from the Government. The effect of the general amnesty proclamation of December 25, 1868, of which this court takes judicial notice, was to restore to him the right to make any use of the remainder he might see fit.

Before that time such right of disposition was in abeyance, not the fee itself. It was a statutory condition limiting the fee, the result of the policy of the confiscation act, and therefore not within the rule as to repugnant conditions sought to be created by will or deed, and condemned as against the policy of the law. This amnesty was so full and complete that it attached to and rendered effectual any conveyances containing general covenants of warranty or seizin made before it went into effect. Such I conceive to be a fair statement of the law as established in *Jenkins* vs. *Collard* (145 U. S., 546) and the authorities there referred to.

There is no word in the entire petition or findings of fact that negatives the fullest knowledge and consent of C. W. C. Dunnington to all that was done. For aught that appears he may have conveyed the remainder to the King heirs, or some person through whom they claimed title, or he may have given his consent to the distribution made by the court of the price paid by the Government

upon condemning the lot. He may, so far as we are advised by this petition and finding of facts, have made disposition of his interest in the principal fund, which stood in lieu of the land, and to which the life tenant was entitled under proper orders by the court as to its investment. There is nothing to show that the court did not make such orders. In fact there is nothing to show that these petitioners have not since received it, except their theory that only a life estate was condemned. Want of notice and lack of compensation to them is immaterial. Their conclusion is a *non sequitur*.

The proceedings were regular, the land was paid for at its then full value, and the proceeds distributed by a court of competent jurisdiction. *Omnia rite acta praesumuntur.*

Nemo est haeres viventis, and under the earlier decisions of this court there can be found no warrant for the assumption that the petitioners had any vested interest in the remainder upon the termination of the life estate, by the death of the original owner, until such death.

Their so-called interest was a contingent one, dependent upon a survival of the original owner, and upon their answering at the termination of the life estate, the description of "heir," and also dependent, as is now settled in this court, upon the question whether such original owner had disposed of the remainder by deed, will, or other mode of alienating the same. (*Jenkins* v. *Collard*, 145 U. S. 546 *supra*.)

In condemnation proceedings, owners of a mere expectancy are not required to be made parties. It is enough if the whole title *in praesenti* is represented. To hold

otherwise would render the power of eminent domain nugatory, for no authority of sufficient prescience could be invoked which could anticipate, and locate, and make parties, every person who upon a consideration of all contingencies, might succeed to the estate.

It follows, therefore, that the petitioners had no interest requiring that they should be made parties, or for which they could have been compensated, and that a petition having reference only to the fact that they were not given compensation, is hopelessly bad, and the decision of the court below, based upon findings of fact, equally as barren as to the relations of C. W. C. Dunnington to the condemnation proceedings and to the subsequent payment to the King heirs, must be reversed. The entire title was taken by the condemnation proceedings and paid for. The money stood in lieu of the land. It was lodged in a proper depository and properly protected by orders of court, as must be presumed. If the claimants have any rights it is suggested that they have wholly mistaken their remedy and chosen the wrong defendant.

I recognize, however, that this court will not sit to determine questions not before it, however interesting such questions might be were they presented by the record, and therefore, without reference to these questions, respectfully submit that the judgment of the court below should be reversed.

CHARLES H. ALDRICH,
Solicitor-General.

SEC. 6. That the public grounds surrounding the Capitol shall be enlarged (according to the plan approved by the Committees on Public Buildings of the Senate and House of Representatives, respectively, which plan is hereby directed to be deposited in the custody of the Secretary of the Interior), by extension between First street east and First street west, in the following manner: Northwardly to the south side of North B street and southwardly to the north side of South B street, including, in addition to so much of the reservations, avenues, and streets as are necessary for such extension, the two squares designated on the plan of the city of Washington as numbers six hundred and eighty-seven and six hundred and eighty-eight, respectively.

SEC. 7. That it shall be the duty of the Secretary of the Interior to purchase, from the owner or owners thereof, at such price, not exceeding its actual cash value, as may be mutually agreed on between the Secretary and such owner or owners, and not exceeding the appraisal made by the commission of nine in their report to Robert Ould, United States district attorney for the District of Columbia, on the twenty-first day of January, eighteen hundred and sixty-one, such private property as may be necessary for carrying this act into effect, the value of the property so purchased to be paid to the owner or owners thereof, out of any money in the Treasury not otherwise appropriated, on the requisition of said Secretary: *Provided*, That before such payment shall be made the owner or owners of the property purchased shall, by good and sufficient deed or deeds, in due form of law, and approved

by the Attorney-General of the United States, fully release and convey to the United States all their and each of their several and respective rights in said titles to such lands and property so purchased.

SEC. 8. That if the Secretary of the Interior shall not be able to agree with the owner or owners of any private property needed for the purposes of this act upon the price to be paid therefor, or if for any other cause he shall be unable to obtain the title to any such property by mutual agreement with the owner or owners thereof, it shall be his duty to make application to the supreme court of the District of Columbia, which court is hereby authorized and required, upon such application, in such mode and under such rules and regulations as it may adopt, to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements thereon necessary to be taken for the public use in accordance with the provisions of this act, and to which the Secretary has been unable to obtain the title by mutual agreement with the owner or owners thereof.

SEC. 9. That the fee simple of all premises so appropriated for public use, of which an appraisement shall have been made under the order and direction of said court, shall, upon payment to the owner or owners, respectively, of the appraised value, or in case the said owner or owners refuse or neglect for fifteen days after the appraisement of the cash value of said lands and improvements by said court to demand the same from the Secretary of the Interior, upon depositing the said appraised value in the said court to the credit of such owner or owners, respectively, be vested in the United States. And the Secretary of the Interior is hereby authorized and required to pay to the several owner or owners, respectively, the appraised value of the several premises as specified in the appraisement of said court, or pay into court by deposit, as hereinbefore

provided, the said appraised values; and the sum necessary, not exceeding four hundred thousand dollars, for such purpose is hereby appropriated out of any moneys in the Treasury not otherwise appropriated: *Provided*, That the Secretary of the Interior is hereby authorized to sell at public auction such materials in the buildings in squares numbered six hunderd and eighty-seven and six hundred and eighty-eight as are not necessary for the public works in this District; and further, that the moneys realized by such sales shall be applied to the improvement and extension of the Capitol grounds.

SEC. 10. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession. The cost occasioned by the inquiry and assessment shall be paid by the United States, and as to other costs which may arise, they shall be charged or taxed as the court may direct.

SEC. 11. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property or any part thereof, or as to the interests of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases, as soon as the United States shall have paid the compensation assessed, or secured its payment, by a deposit of money, under the order of the court, possession of the property may be taken.

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SEP 6 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 51.

THE UNITED STATES, Appellant,

vs.

CHARLES A. DUNNINGTON et al.

No. 52.

CHARLES A. DUNNINGTON et al., Appellants,

vs.

THE UNITED STATES.

BRIEF OF

CHARLES W. HORNOR and
GEORGE A. KING,
For CHARLES A. DUNNINGTON *et al.*

PRESS OF H. L. McQUEEN, WASHINGTON.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, Appellant,
v.
CHARLES A. DUNNINGTON *et al.* } No. 51.

CHARLES A. DUNNINGTON *et. al.*, Appellants,
v.
THE UNITED STATES. } No. 52.

Brief for Charles A. Dunnington *et al.*

I. Statement of the Case.

Charles W. C. Dunnington, the ancestor of the claimants, was in 1863, and for many years before, the owner in fee-simple of lot No. 3, square 688, in the city of Washington, D. C. (Finding I, p. 4.)

May 12, 1863, proceedings were instituted by the United States under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and the joint resolution explanatory thereof of the same date, 12 Stat. 589, 627, in the Supreme Court of the District of Columbia, to confiscate said lot as the property of said Dunnington, who was then in rebellion against the United States. (Finding II, p. 4.)

By §§ 5–8 of this act, 12 Stat. 590, 591, it was enacted as follows:

"SEC. 5. *And be it further enacted*, That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States, that is to say:

"First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the Government of the United States.

"Secondly. Of any person hereafter acting as President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner or consul of the so-called Confederate States of America.

"Thirdly. Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of any of the so-called Confederate States of America.

"Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called Confederate States of America.

"Fifthly. Of any person hereafter holding any office or agency under government of the so-called Confederate States of America, or under any of the several States of the said Confederacy, or the laws thereof, whether such office or agency be national, State, or municipal in its name or character: *Provided*, That the persons, thirdly, fourthly, and fifthly above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called Confederate States.

"Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void;

and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"SEC. 6. *And be it further enacted*, That if any person within any State or Territory of the United States other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks, and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof. And all sales, transfers or conveyances, of any such property after the expiration of the said sixty days from the date of such warning and proclamation shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"SEC. 7. *And be it further enacted*, That to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, or in any territorial court, or in the United States District Court for the District of Columbia, within which the property above described, or any part thereof may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property and become the property of the United States, and may be disposed of as the court shall decree and the pro-

ceeds thereof paid into the treasury of the United States for the purposes aforesaid.

"SEC. 8. *And be it further enacted*, That the several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto. And the said courts shall have power to allow such fees and charges of their officers as shall be reasonable and proper in the premises."

And by the joint resolution of the same date, 12 Stat. 627, the following provision was made:.

"Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

Under these proceedings the lot was duly condemned as enemy property and exposed to public sale, at which one A. R. Shepherd became the purchaser, and entered into possession. (Finding II, p. 4.)

By the legislative, executive, and judicial appropriation act of May 8, 1872, 17 Stat. 61, 83, 84, § 6, it was directed that the public grounds surrounding the Capitol should be enlarged by extension to B street North and B street South, between 1st street East and 1st street West, including squares 687 and 688, in the latter of which the lot here in question was situated.

§ 7 made it "the duty of the Secretary of the Interior to purchase, from the owner or owners thereof, at such price, not exceeding its actual cash value, as may be mutually agreed on," "such private property as may be necessary for carrying this act into effect."

By § 8 it was directed—

"That if the Secretary of the Interior shall not be able to agree with the owner or owners of any private property needed for the purposes of this act upon the price to be paid therefor, or if for any other cause he shall be unable to obtain the title to any such property by mutual agreement with the owner or owners thereof, it shall be his duty to make application to the Supreme Court of the District of Columbia, which court is hereby authorized and required, upon such application, in such mode, and under such rules and regulations as it may adopt, to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements thereon necessary to be taken for the public use, in accordance with the provisions of this act, and to which the Secretary has been unable to obtain the title by mutual agreement with the owner or owners thereof.

"SEC. 9. That the fee-simple of all premises so appropriated for public use, of which an appraisement shall have been made under the order and direction of said court, shall, upon payment to the owner or owners, respectively, of the appraised value, or in case the said owner or owners refuse or neglect for fifteen days after the appraisement of the cash value of said lands and improvements by said court to demand the same from the Secretary of the Interior, upon depositing the said appraised value in the said court to the credit of such owner or owners, respectively, be vested in the United States. And the Secretary of the Interior is hereby authorized and required to pay to the several owner or owners, respectively, the appraised value of the several premises as specified in the appraisement of said court, or pay into court by deposit, as hereinbefore provided, the said appraised values; and the sum necessary, not exceeding four hundred thousand dollars, for such purpose is hereby appropriated out of any moneys in the Treasury not otherwise appropriated," etc.

§ 10 authorized the court to "direct the time and manner in which possession of the property condemned shall be taken or delivered."

§ 11 provided—

"That no delay in making an assessment of compensation or in taking possession shall be occasioned by any doubt which may arise as to the ownership of the property or any part thereof, or as to the interests of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the United States shall have paid the compensation assessed, or secured its payment by a deposit of money, under the order of the court, possession of the property may be taken."

Under this act proceedings were commenced in the Supreme Court of the District of Columbia, at the instance of the defendant, for the acquisition of land to enlarge the grounds around the Capitol, in which contemplated enlargement said lot No. 3 was included.

June 11, 1872, the Secretary of the Interior informed the court that he was unable to obtain the titles to said land by mutual agreement with the owners. Thereupon the court appointed commissioners "to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements, necessary to be taken for public use, and make return to said court."

October 16, 1872, said commissioners filed their report, in which the cash value of said lot No. 3 is appraised at $1.50 a square foot, and the improvements thereon at $1,500. They also report that said lot contained 5,572 square feet, thus making the whole value of lot and improvements $9,858.

On the same day said appraisement was approved and adopted by the court, and the same was reported to the Secretary of the Interior. (Finding III, pp. 4, 5.)

The act of March 3, 1873, 17 Stat. 537, directed that the property in squares 687 and 688 required for the ex-

tension of the Capitol grounds "shall be purchased at the prices fixed in the report of the Commissioners appointed by the Supreme Court of the District of Columbia to appraise the value of such property."

March 15, 1873, the court made the following order:

"Whereas it appears to the court that the owner or owners of each of said lots and parts of lots have failed and neglected to demand of the Secretary of the Interior the said appraised cash values of said lots and parts of lots, respectively, for fifteen days after the appraisement thereof by this court, it is therefore ordered that leave be, and is hereby, granted to said relator to deposit the said appraised values of said lots and parts of lots in this court, to the credit of the owners thereof, respectively, subject to be drawn therefrom only upon an order of this court for payment to the parties entitled; and it is further ordered that upon the depositing of the money by the relator as hereinbefore provided, and notice thereof filed with the clerk of this court, possession of the property for which such deposit is made may be taken by the United States." (Finding III, p. 5.)

March 31, 1873, in pursuance of this order, a certificate of deposit for the amount of the appraisement was filed with the court by the Secretary of the Interior.

Thereupon the United States took possession of said lot, and the same is now embraced within the ornamental grounds about the Capitol. (Finding IV, p. 5.)

April 3, 1873, the whole appraised value of said lot and improvements, amounting to $9,858 was, in accordance with a petition to that effect, paid to the heirs of one Martin King, deceased, who had become vested through several intermediate conveyances with the title acquired at the confiscation sale by A. R. Shepherd. (Finding V, p. 5.)

Charles W. C. Dunnington lived till August 14, 1887, on which date he died, leaving as his heirs the present claimants. (Finding I, p. 4.)

At the date of his death the land was worth two dollars a square foot, making its value on that date $11,144, and with the improvements valued at $1,500, $12,644. (Finding VI, p. 5.)

The claimants, his heirs, filed their petition in the Court of Claims October 26, 1887 (p. 1), claiming the value of the lot and improvements thereon at the date of the death of their ancestor, $12,644.

The Court of Claims awarded them the value as appraised by the Commissioners appointed by the court in the condemnation proceedings, $9,858, and gave judgment for that amount on May 6, 1889 (p. 8).

From this judgment both parties appealed (pp. 8, 9).

II. Assignment of Error.

The claimants and appellants hereby assign the following error in the judgment of the Court of Claims:

That said judgment was for only $9,858, the value of said lot and improvements as the same were assessed by the Commissioners appointed by the Supreme Court of the District of Columbia in 1872, whereas the same should have been for $12,644, the value of said lot and improvements on August 14, 1887, the date of the death of Charles W. C. Dunnington.

III. Brief of Argument.

A. On the Appeal of the United States.

The ground upon which the Court of Claims sustained the right of the claimants to recover in this case is tersely stated by the late lamented Judge Scofield of that court, who delivered the opinion, as follows:

"It is conceded by counsel for the defendants that, under the construction put upon the Confiscation Acts by the Supreme Court, the estate acquired by Shepherd terminated at the death of Dunnington, and that the fee then

devolved upon the claimants, or at least would have so devolved if the land had not already been taken by the defendants through the proceedings in court and appropriated to public use. It is also conceded that the claimants have not, in fact, received any compensation therefor.

"This suit is brought to recover the 'just compensation' which the Constitution requires should be made to the owners of private property when taken for public use.

"It will scarcely be denied that justice requires that the land should be surrendered or its appraised value paid to the claimants. In this suit they seek only 'just compensation,' the recovery and payment of which, as the court understands it, confirms in the defendants the possession and title now claimed by them."

The propositions of law relied upon by the claimants may be summarized as follows:

1. By the confiscation proceedings against Charles W. C. Dunnington, his entire estate, right, title, and interest in and to lot 3 in square 688 were completely divested and forfeited to the United States.

2. Said forfeiture continued during the natural life of the offender, Charles W. C. Dunnington, until his death, which occurred on the 14th day of August, 1887.

3. From the time of the forfeiture of the estate under the confiscation act in 1863 until the 14th day of August, 1887, neither said Charles W. C. Dunnington, nor his prospective or expectant heirs, nor any one of them, retained any right, title, or interest which could be asserted in any court of law or equity in or to the said property, or any portion thereof.

4. Upon the death of said Charles W. C. Dunnington, on August 14, 1887, the forfeiture of said property determined and ended, and the fee-simple of the same vested *eo instanti* in these claimants, his heirs at law.

5. From the time of the forfeiture of the property by the confiscation proceedings in 1863 until the death of said Charles W. C. Dunnington in 1887, the fee-simple of

the property was in the United States in trust for the benefit of the heirs at law of said Dunnington.

6. Neither the claimants herein nor their ancestor, the said Charles W. C. Dunnington, had any day in court whatever in the proceedings for the condemnation of the property for public uses in 1872 and 1873, nor was it in law possible for them to intervene or assert any claim whatever in those proceedings.

7. It was the duty of the United States as plaintiffs in the condemnation proceedings to have taken proper steps by application to the Supreme Court of the District of Columbia for the payment of the sum fixed by the appraisers as the value of the property to the persons entitled thereto by either apportioning the same between the then tenants—*per autre vie* and those who should appear after the death of Dunnington to be entitled to the property, or for the investment of the capital sum—the interest or rents thereof to be paid to said tenants *per autre vie* during the lifetime of the *cestui que vie,* and for the ultimate delivery of the capital after the death of said *cestui que vie* to those who might be entitled thereto, it being at that date impossible to ascertain with any approach to certainty who such persons would be.

8. Said Supreme Court not having taken such proceedings, and having under misapprehensions then prevalent as to the effect of the confiscation act paid the whole of the appraised value to the tenants for life, the present claimants are not barred of their right by such action, but may seek their remedy in the Court of Claims under the constitutional duty of the United States to compensate for private property taken for public uses.

9. No rights having accrued to these claimants assertable or enforcible in any court until the death of their ancestor on the 14th of August, 1887, they are not chargeable with laches by reason of their non-assertion of such

rights at an earlier date, nor had the statute of limitations barred their claim.

If these propositions are sustained their inevitable result will be a judgment in favor of these claimants for the value of their property thus taken for public uses.

In *Bigelow* v. *Forrest*, 9 Wall. 339, this court had occasion to consider the effect of a decree of forfeiture and sale under the confiscation act of July 17, 1862, and joint resolution of the same date. Construing the act and the resolution together this court held, p. 350, that—

"They admit of no doubt that all which could under the law become the property of the United States or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized terminating with the life of the person for whose act it had been seized."

This decision was rendered at the December Term, 1869, of this court. It was at first supposed by many to hold that what was forfeited was a life estate carved out of a fee, thus divesting the offender of his estate for life, but leaving in him the fee-simple which was not only descendible to his heirs, but which he could dispose of and convey as he might any other property.

It was upon this ground that the Supreme Court of the District of Columbia in *Wallach* v. *Van Riswick*, 1 MacArthur, 73, held that even after a decree of confiscation of the property the confederate might execute a valid mortgage or conveyance of the property, which, however, would only take effect at the termination of his own life.

This view, however, did not meet the approval of this court, for on appeal the decree was reversed. *Wallach* v. *Van Riswick*, 92 U. S. 202.

In that case the confiscation act and joint resolution explanatory thereof received a most full and masterly

elucidation from Mr. Justice Strong, delivering the opinion of the court, and it was held that the joint resolution of July 17, 1862, was not intended as descriptive of the quality of the estate forfeited to the United States, but was a mere limitation of the duration of the forfeiture. It was not, therefore, a life estate which was confiscated to the United States, but the fee-simple defeasible by the death of the rebel. "The forfeiture, while it lasted," says the Supreme Court, "was complete." And, p. 207: "It covers the estate of the owner—all his estate or ownership. No authority is given to seize less than the whole." And again, p. 209, in considering the joint resolution: "The obvious meaning is that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death the land shall pass or be owned as if it had not been forfeited. Nothing warrants the belief that it was intended, that while the forfeiture lasts, it should not be complete, viz. a devolution upon the United States of the offender's entire right."

Again, p. 211, he cites the case of *Burgess* v. *Wheat*, 1 Eden, 201, where it was said: "The crown holds in this case as a *royal trustee*."

Further on in this instructive opinion the common-law maxim that a fee can not be in abeyance was discussed, and a decision of the question was waived as to whether the fee was in the United States or in the purchaser, it being held by the court expressly that it could not remain in the person whose estate was seized.

This decision was made at the October Term, 1875, of this court.

In *French* v. *Wade*, 102 U. S. 132, decided October Term, 1880, it was said, p. 134, referring to *Wallach* v. *Van Riswick*, 92 U. S. 202, just cited:

"This case has been followed many times since. *Pike* v. *Wassell*, 94 U. S. 711. It must now be considered as the settled rule of decision in this court."

We do not understand that *Wallach* v. *Van Riswick*, followed as this court has itself stated it to have been many times, and which had as long ago as 1880 become the settled rule of decision in this court, has ever been overruled, whatever distinctions or limitations may have been made as to its application and effect. Whether in the case at bar, for instance, any voluntary sale or conveyance by Charles W. C. Dunnington during his lifetime of the fee-simple would have bound his heirs by estoppel, is a question not arising in the case, and which does not call for a decision from this court. What we do contend is that by the express terms of the confiscation act, as it has been interpreted by repeated decisions of this court neither Dunnington nor his then expectant heirs retained any estate, title, right, or interest in the forfeited property, and were therefore in no default by reason of not appearing in the condemnation proceedings.

It can hardly be contended that the elder Dunnington was himself in default by his non-appearance; his whole estate was gone. It had by the terms of the confiscation act "become the property of the United States." While it is true the joint resolution provided that no proceedings under the act shall "be so construed as to work a forfeiture of the real estate of the offender beyond his natural life," this provision was manifestly not intended for the benefit of the rebel offender himself. His heirs, or those who should appear to be such at the time of his death, were, to use the language of this court in *Pike* v. *Wassell*, 94 U. S. 711, 715, "those for whose benefit the joint resolution of Congress was passed." The fee, page 714, "was withheld from confiscation exclusively for the benefit of

the heirs. They, and they alone, could take it at the termination of the life estate."

But, again, it can not reasonably be contended that Dunnington's expectant heirs should or could have intervened in the condemnation proceedings in behalf of their interest. They had none at the time, either present or prospective, as was held in express terms in *Bigelow* v. *Forrest*, 9 Wall. 339, 352. The condemnation proceedings were in 1872 and 1873. Dunnington's death did not take place for fourteen years thereafter. In the meantime it could not be known with any approach to certainty who would be his heirs at the time of his death, nor was it by any means certain that those who stood in the position of probable, prospective, or presumptive heirs, would so remain till he died. The interest of an heir during the lifetime of his ancestor is not recognized by the law. *Nemo est hæres viventis. Hutchins* v. *Hutchins*, 7 Hill, 104; *Jackson* v. *Kniffen*, 2 Johns. 31, 36; *Doe* dem. *Winter* v. *Perratt*, 5 B. & C. 48; Broome, Legal Maxims, 522; Williams, Real Property, 88.

It is for this reason that what is popularly called an heir expectant or presumptive has no rights recognized by the law, for no man can tell who will be the heir of a person now living.

Impossible, then, as it was to know who would be the persons interested in the estate after the forfeiture should have terminated by the death of the offender, how can it in justice be contended that it was the duty of either Dunnington or his children to intervene in the condemnation proceedings for the protection of their interests,—interests neither vested nor contingent, not recognized by the law, and which could not possibly come into being until the death of their ancestor, an event whose date could not be foretold, and which did not in fact occur for many years afterward?

Manifestly it was the duty of the United States as plaintiffs or of the court upon its own motion, to see to the interests of these claimants or of such as there might be in future times, and to have had the purchase-money so secured that upon the termination of the forfeiture by the death of the offender, Dunnington, the fee-simple price of the property would be ready for delivery to the heirs.

In re *Phillips' Trusts*, L. R. 6 Eq. 250; In re *Pfleger*, L. R. 6 Eq. 426; Delalleau, Traité de l'Expropriation, p. 246, § 891.

Having thus made payment in its own wrong, and in prejudice of the rights of these claimants, the Government can not escape liability on the plea that they should have intervened. No intervention was possible. To hold against these parties would in effect permit the Government to deprive them of their property without a day in court or an opportunity to be heard—a thing abhorrent to the judicial sense of justice, and expressly prohibited by art. 5 of the constitutional amendments. *McVeigh* v. *United States*, 11 Wall. 259; *Lasere* v. *Rochereau*, 17 Wall. 437; *Windsor* v. *McVeigh*, 93 U. S. 274; *Ensminger* v. *Powers*, 108 U. S. 292, 301.

All possible objections to a recovery in this case are met and most ably answered in the opinion delivered by Judge Scofield for the court, from which (pages 6 and 7) we quote:

"Two objections are interposed to such recovery:

"First. It is said the defendants have already discharged their constitutional obligation, by depositing the compensation claimed with the court of the District, and that the order of the court directing the same to be paid to parties other than the claimants is an adjudication of ownership conclusive upon all parties claiming title.

"The place and manner of deposit were designated in a special law, made by the defendants for their own

convenience. The Constitution required the defendants to make 'just compensation' to owners. It makes no difference to such owners through what channels or by what agency the compensation may be sent, provided it finally reaches the right party. Placing the compensation where the rightful owners may never be able to claim it, and where, as in this case, they could by no possibility hear of it until it had passed beyond their reach, is not a fulfillment of the constitutional obligation.

"So far as the order of court is concerned it ought to be a satisfactory answer to say that the claimants were not parties to it. If Dunnington had died prior to these proceedings they might have been parties to, and concluded by, them. As it was, they were neither summoned nor heard, and it was impossible that they should be, because at that time they had no legal existence. The court, even, was not advised, so far as the record shows, that any such claim existed or might ever arise. But, in legal contemplation, the defendants knew of it, for they were the originators of and parties to the confiscation proceedings, whereby the title of Dunnington was divested and hung up somewhere, possibly in the defendants, as trustees, until by his death it should devolve upon whoever should then be found to be his heirs. *Wallach* v. *Van Riswick*, 92 U. S. R. 202; *Shields* v. *Schiff*, 124 U. S. R. 351.

"We are unable to see how, under such circumstances, the claimants' right to compensation could be defeated, either by the deposit in the court or by any disposition of it which the court may have made. When they came into their title they had a right, by affirming so much of the condemnation proceedings as vest title in the defendants, to claim the appraised value.

"The second objection is to the jurisdiction of the court. That jurisdiction, by section 1069 of the Revised Statutes, extends to 'all claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract expressed or implied.' In the facts of this case all these elements of jurisdiction are to some extent combined. The defendants took private property for public use, and the Constitution enjoins

them to make 'just compensation.' The very taking imposes upon the defendants a duty from which alone a promise to do the only thing that justifies the taking may be implied. But there was also a law of Congress which undertook to discharge that duty. It directed that compensation should be made and prescribed a mode of ascertaining the amount of it. It went further, and made an appropriation to meet it, and directed the Secretary of the Interior to pay it over. The amount was ascertained, the money drawn from the Treasury, and only failed of finally reaching the claimants by a misdirection in the transmission of it. For this misdirection the claimants were not, but the defendants were, responsible. These facts combined not only constitute an implied promise, but may be regarded as a continuing offer of settlement, which the claimants accepted at the first possible opportunity. They attest at once both the liability of the defendants and the jurisdiction of the court."

The learned judge proceeds to cite from the opinion of this court in the case of *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, thereby fully sustaining his positions. He also refers to *Hollister* v. *Benedict Manufacturing Co.* 113 U. S. 67, and *Great Falls Manufacturing Co.* v. *Attorney-General*, 124 U. S. 581, which are equally conclusive in the same line.

B. On the Appeal of the Claimants.

Thus far we have argued in support of the opinion and judgment of the Court of Claims, which is upon all the main questions in the case entirely in our favor.

The appeal of the claimants goes only to the subsidiary and incidental question of the amount. This, we submit, should have been $12,644, the value as it existed at the time of Dunnington's death, instead of $9,858, the value at the time the land was originally condemned in 1873.

It may be conceded that up to August 14, 1887, the date of Dunnington's death, the United States rightfully occupied the property in dispute. On that date his heirs became entitled to its delivery to them in kind, or to its value. Possibly they might have maintained an action of ejectment against the officers of the United States in possession similar to that sustained in the celebrated case of the Arlington Estate, *United States* v. *Lee*, 106 U. S. 196. But as the property has by legislative authority been directed to be acquired as a portion of the Capitol Grounds, and could not possibly be severed from the remainder of the ornamental park without destroying its entire artistic beauty, it can not be doubted that the claimants may waive their right to proceed against the officers of the United States as for a tort and claim from the United States that just compensation assured by the Constitution for property taken for public uses.

Their rights accrued and became vested on and not before the 14th of August, 1887. This amply demonstrates not only that their right of suit is not barred by any statute of limitation, but, on the other hand, that their measure of recovery should be the value as it existed upon that date. This value is shown in Finding VI, p. 5, to be $12,644.

The judgment of the Court of Claims, with a mere modification of the amount to that sum, should therefore be affirmed.

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